

No. 523

JAN 27 1949

IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

T. M. DUCHE & SONS, INC.,

Petitioner,

v.

THE UNITED STATES.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CUSTOMS
AND PATENT APPEALS**

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Dated: New York, N. Y.,
January 27, 1949.



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**PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, T. M. Duche & Sons, Inc. prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in *T. M. Duche & Sons, Inc. v. United States*, Customs Appeal No. 4576, entered November 2, 1948, affirming a judgment of the United States Customs Court rendered January 15, 1947.

Opinions below

The opinion of the trial court (R., p. 48) is reported in C. D. 1040, Volume 18 U. S. Customs Court Rep., page 25. The opinion of the Court of Customs and Patent Appeals (R., p. 112) is reported as C. A. D. 391, weekly "Treasury Decisions" of December 16, 1948, Vol. 83 No. 51, page 36. Introduced in evidence in the present case is the record in *David L. Moss Co. Inc. v. United States*, 26 C. C. P. A. (Customs) 381, C. A. D. 45. The opinion in the Customs Court in this latter case appears in T. D. 48985, 71 Treasury Decision, page 825, decided May 17, 1937.

Jurisdiction

The judgment of the Court of Customs and Patent Appeals was entered on November 2, 1948 (R., p. 125). This petition is filed under Rules 42 and 38 of the Rules of this Court, pursuant to Section 195 of the Judicial Code as amended (U. S. C. Title 28, Section 1256), providing that:

“Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari.”

The statutes involved are Sections 514 and 515 of the Tariff Act of 1930 (U. S. C. Title 19, Sections 1514, 1515, 46 Stat. 734, and Section 336 of the Tariff Act of 1930 (U. S. C. Title 19, Section 1336, 46 Stat. 701). These statutes are set forth in the appendix hereto.

Statement

Sections 514 and 515 of the Tariff Act of 1930, *supra*, grant to importers the right to judicial review of all decisions of Collectors of Customs including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable on imported merchandise.

Said Section 336 of the Tariff Act of 1930 provides for delegation of legislative powers to the President to adjust tariff duties upward or downward within prescribed limits to equalize differences in foreign and domestic costs of production. The statute provides that before the President may act, there must be an investigation and report by the Tariff Commission. The statute specifically defines costs of production and specifies other limitations upon the delegated powers.

Petitioner imported certain dried egg albumen which was assessed for duty by the Collector of Customs at New

York at a rate of 27¢ per pound under a Presidential proclamation issued after investigation and report by the Tariff Commission under said Section 336 of said Act (T. D. 44997, 60 Treasury Decisions, p. 20, R., p. 103).

Petitioner filed a protest under said Section 514, contending that the said Presidential proclamation is illegal, null and void because based upon a report of the Tariff Commission (R., p. 82) which shows on its face that there was no legal compliance with jurisdictional requirements of said Section 336 in that—

- (a) No domestic article as defined in Section 336 was commercially produced in the United States.
- (b) No domestic costs of production as defined in Section 336 were obtained.
- (c) The domestic costs of production upon which the President's proclamation was based were not actual commercial costs.
- (d) The said proclamation was based on calculated costs for a related article to that under investigation, notwithstanding the fact that Congress had specifically refused to amend the law to permit of consideration of costs of such a related article.
- (e) The action of the President was illegal and void because contrary to and beyond the powers delegated by the Congress.

It is claimed that the imported dried egg albumen is properly dutiable at the rate of 18¢ per pound fixed by Congress in the enactment of Paragraph 713, Tariff Act of 1930 (U. S. C. Title 19, Sec. 1001, par. 713).

In *Moss v. United States*, T. D. 48985, *supra*, a similar protest was overruled by the Customs Court on the ground that it had no power to review a proclamation of the President or findings upon which it was based. Upon

appeal to the Court of Customs and Patent Appeals, four of the five judges of that Court held that that Court and the Customs Court had jurisdiction to determine whether the statutory requirements of said Section 336 had been complied with. Two of said judges held that the proclamation was valid while two held it to be invalid. The fifth judge took the position that the Court had no power to review the proclamation or the findings of the Tariff Commission as to jurisdiction, but only as to matters of form. The effect was to affirm the holding of the lower court that it had no power of review. *Moss v. United States*, 26 C. C. P. A. Customs 381, C. A. D. 45.¹

Petitioner sought to raise the question again by the present protest. The Customs Court, one judge dissenting, reaffirmed its decision in the *Moss* case and held it had no authority to review the proclamation of the President or the findings of the Tariff Commission for any purpose, citing as authority the decision of this Court in *United States v. George S. Bush & Co., Inc.*, 310 U. S. 371 of 1940. Said *Bush* case was decided by this Court subsequent to the litigation in the case of *Moss v. United States*, *supra*. Upon appeal, the Court of Customs and Patent Appeals, with one judge dissenting, affirmed this holding, also upon alleged authority of *United States v. Bush*, *supra*.

Questions presented

1.—Is compliance with the standards and limitations prescribed by Congress in delegating legislative powers in said Section 336, necessary to valid exercise of such legislative delegation.

¹ Jackson, Judge, having declined to participate in this case because of his connection with same as Assistant Attorney General of the United States, Judge John J. Parker, Senior United States Circuit Judge of the Fourth Judicial Circuit, was designated to serve pursuant to the provisions of title 28, U.S.C. 301 (Section 188, Judicial Code).

2.—If such standards and legislative limitations be violated, does the Customs Court and upon appeal, the Court of Customs and Patent Appeals, possess the power to review such action pursuant to protest filed under Sections 514 and 515, Tariff Act of 1930.

3.—Does lack of existence of a domestic article for which actual costs of production are ascertainable, preclude any change in duty under the requirement of said Section 336 that any change must be based upon an ascertained difference in costs of production.

4.—Can the provisions of said Section 336, requiring in certain instances application of an *ad valorem* duty based on the American selling price of the article under investigation, be given any force and effect unless there exists such a domestic article produced in commercial quantities and sold commercially in the United States.

5.—Does the case of *United States v. George S. Bush, supra*, preclude judicial review by the Customs Court and the Court of Customs and Patent Appeals to determine whether jurisdictional requirements of said Section 336 have been satisfied.

Reasons for granting writ

1.—The constitutionality of the predecessor statute to Section 336 of the Tariff Act of 1930, namely Section 315 of the Tariff Act of 1922 (Act of Sept. 21, 1922, Chap. 356, 42 Stat. 858, 941) was upheld in *Hampton v. United States*, 276 U. S. 394 of 1928, on the ground that Congress had set forth therein intelligible principles or standards to which the President, as the legislative agent of Congress, was directed to conform. If the President or the Tariff Commission may disregard these legislative standards or intelligible principles at will, the basis upon which the validity of this delegated power was sustained disappears.

2.—The decision of the Court of Customs and Patent Appeals herein is contrary to decisions of this Court holding that findings of fact made under delegated legislative powers may be judicially reviewed and held invalid if made without power or in the absence of some jurisdictional fact or facts necessary to their validity. *Muser v. Magone*, 155 U. S. 240, 247; *Waite v. Macy*, 246 U. S. 606, 610; *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144; *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Crowell v. Benson*, 285 U. S. 22.

3.—The case of *United States v. George S. Bush*, *supra*, does not bar judicial action to prevent violation of the delegated powers disclosed by the instant record. The *Bush* case was confined to question of the power of the President and Tariff Commission to use a rate for conversion of currency for a period of time different from and later than the period of time covered by cost of production data. The power or duty of the Tariff Commission and the President to convert foreign currencies was neither defined nor limited by law but was a discretionary matter left at large. The Court held that the action of the Commission and the President was therefore within the field of discretionary action which could not be reviewed in the Courts.

4.—The existence of a domestic article for which costs of production as defined under said Section 336 must be obtained was not left at large by the Congress. The existence of such an article and of actual cost data therefor is the very basis upon which operation of the statute is made to depend. The record establishes that a domestic article and actual cost of production for such an article as defined in the statute did not exist here.

5.—*United States v. Bush*, *supra*, originated in the Customs Court by an appeal to reappraisement under Section

501 of the Tariff Act of 1930 (U. S. C. Title 19, Section 1501). Said Section 501 does not include any specific provision for judicial review of the legality of orders and findings entering into decisions of Customs officers such as is found in Sections 514 and 515 of that Act.

6.—Sections 514 and 515 of the Tariff Act of 1930 provide expressly for judicial review of all decisions of Collectors of Customs including the legality of all orders and findings entering into the same. No question of a vested right to the maintenance of a rate of duty enters into this specific legislative grant of this right to judicial review. An order or finding of the President and the Tariff Commission under said Section 336 is directly comprehended by this statutory provision. The decision of the Court of Customs and Patent Appeals, limiting judicial review to determination whether the proclamation of the President is on its face in conformity with the law, destroys this statutory judicial process established by the Congress for tariff questions. *Barr v. United States*, 324 U. S. 83.

7.—The decision of the Court of Customs and Patent Appeals herein overrules a prior recent decision of that Court in the *Moss* case, *supra*, and seems in conflict with other prior decisions such as *Akwo v. United States*, 23 C. C. P. A. Customs 75, T. D. 47737, and *Zeiss v. United States*, 23 C. C. P. A. Customs 7, T. D. 47654. Said decision leaves in doubt the power of that Court and the Customs Court to review action by the Tariff Commission and the President violating specific requirements established by the Congress in delegating legislative powers under said Section 336. Clarification of the right of judicial review and of the extent of the powers of the Tariff Commission and the President under said Section 336 is of importance to the proper administration of that section of law, to the foreign trade of the United States, to importers, American manufacturers and the general public.

8.—Section 402, Tariff Act of 1930 (U. S. C. Title 19, Sec. 1402, 46 Stat. 708) can not be administered, nor can said Section 336 (b) be made effective under the decision of the Court of Customs and Patent Appeals herein.

9.—Under the decision of the Court of Customs and Patent Appeals, the strict limitations imposed by Congress in delegating its legislative power under said Section 336, may be completely disregarded and the integrity of the administrative processes destroyed.

Under that decision, no matter how extreme the action of the Tariff Commission or the President may be in disregard or violation of the delegated powers, the Customs Court and the Court of Customs and Patent Appeals would be powerless to act.

Congress intended judicial review to insure administrative action within the delegated limits. Confirmation of judicial review and setting aside of the proclamation herein would carry out the aim of Congress to guard against administrative action exceeding statutory bounds. It would give effect to the interest of Congress, the President and the general public in this field.

The questions involved are of primary importance in the field of judicial review of administrative action and have not been but should be passed upon by this Court.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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J. BRADLEY COLBURN,
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Dated: New York, N. Y.,
January 27, 1949.

Appendix

SEC. 514. PROTEST AGAINST COLLECTOR'S DECISIONS.

Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of any entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation.

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Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision. If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against his modification of any decision, and, in the case of merchandise entered for consumption, if all duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law.

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reasons therefor, upon application of any interested party,

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shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) *Change to American Selling Price.*—If the commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402(g), of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

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(c) Proclamation by the President.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) Effective Date of Rates and Changes.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) Ascertainment of Differences in Costs of Production.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds it practicable:

(1) In the Case of a Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs, and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) In the Case of a Foreign Article.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or

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markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) Modification of Changes in Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition Against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the article provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) Definitions.—For the purpose of this section—

(1) The term “domestic article” means an article wholly or in part the growth of product of the United

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States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term "cost of production", when applied with respect to either a domestic article or a foreign article includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules and Regulations of President.—The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) Rules and Regulations of Secretary of Treasury.—The Secretary of the Treasury is authorized to make such

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rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) Investigations Prior to Enactment of Act.—All uncompleted investigations instituted prior to the approval of this Act under the provisions of section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.